IN THE

Supreme Court of the United States

October Term 1948.

No. 143.

ALVIN KRULEWITCH,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition to Enlarge Scope of Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alvin Krulewitch, respectfully prays for an enlargement of the scope of review under the writ of certiorari granted by this honorable court to the United States Court of Appeals for the Second Circuit, on October 11, 1948.

The writ granted on that date was limited to the third question presented by the original petition, to wit:

> "3. It was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged delarations of a coconspirator after the termination of the alleged conspiracy and not in furtherance thereof."

That particular point had been decided by the Second Circuit Court of Appeals herein in a manner contrary to the

holding on a like point by the Fifth Circuit Court of Appeals in *Bryan* v. *U. S.*, 17 F. 2d 741.

Inasmuch as this Court is about to review the ruling referred to, petitioner desires to call to its attention that there are other important questions in the case, including several probable errors, which may well be determinative of the outcome. These other questions will be briefly indicated, the same numerical designations being retained as in the original petition:

1. The case involves a fundamental question of search and seizure. It had been ruled in petitioner's favor that the Government's agents had conducted an illegal search and had improperly seized petitioner's belongings. Nevertheless, at several points during the trial, when petitioner challenged the source of certain significant evidence as constituting the products of the illegal search and seizure, the trial judge, ignoring the procedure prescribed by *Nardone* v. *U. S.*, 308 U. S. 338, and other controlling cases, received the evidence on the bald assurance of the prosecutor that the evidence was not derived from the illegal search. It is submitted that there is no previous judicial sanction for the substitution of the Government's *ipse dixit* for the proof patently required. The precedent thus established is novel and dangerous, being fraught with unwholesome possibilities of invasion of substantial rights.

2. It is impossible to justify the refusal by the trial court to compel the Government's principal witness to disclose her residence address at the time of the trial. This ruling effectively barred a vital avenue of cross-examination. That the error was prejudicial and reversible is plainly established in *Alford* v. *U. S.*, 282 U. S. 687, which the Circuit Court of Appeals did not, it is submitted, effectively distinguish herein.

4. As to the second most important witness for the prosecution, a crucial error was committed in permitting

him to testify regarding his "understanding" to a certain conversation. As was indicated in the brief submitted in support of the original petition, the vast weight of authority declares such proof to be improper, and the state of the record herein is such that it may be fairly argued that on it rests the conviction.

5. Another ruling excluded clearly competent proof of bias and prejudice on the part of the complaining witness. Far from being harmless, as characterized by the Circuit Court of Appeals, it tended to deprive petitioner of additional proof on a subject that is always properly at issue in a criminal case.

6. The instructions to the jury injected into the case a theory of prosecution that had theretofore been entirely absent, and, coupled with an admittedly erroneous definition, served to create confusion where precision was mandatory. The incorrectness of the charge was admitted by the Circuit Court of Appeals (p. 864), but the attempted justification was squarely at variance with the First Circuit holding in *Malaga* v. *U. S.*, 57 F. 2d 822, and the Fourth Circuit decision in *Van Pelt* v. *U. S.*, 240 F. 346.

7. The Circuit Court of Appeals herein rejected the rule laid down in the Third Circuit decision in *Speiller* v. *U. S.*, 31 F. 2d 682, and approved the refusal of the requested charge that the testimony of the complaining witness should be considered by the jury with great caution and subjected to the closest scrutiny. The omission of the admonition was manifestly prejudicial.

8. The trial court advised the jury during their deliberations that they could recommend leniency. The giving of such an instruction without qualification that the recommendation is not binding is error. The Circuit Court of Appeals recognized (p. 866) that "the state court

cases seem to be in conflict as to whether this was erroneous at all. It proceeded to dismiss the contention on the ground that there was no "plain error." The cases sustaining petitioner's position in this regard take a contrary view, and it is submitted that the inherent prejudice of the procedure is such as to call for authoritative review.

9. With respect to the proceedings relating to the misconduct of a juror and the independent misconduct of a bailiff, the denial of a hearing to the petitioner, notwithstanding his substantial showing, was squarely at variance with the ruling in the Seventh Circuit in *U. S. v. Sorcey*, 151 F. 2d 899. Moreover, in one phase it contravened the principles laid down in *Clark v. U. S.*, 289 U. S. 1.

In a case wherein the petitioner's liberty is at stake, the interests of justice would seem to require that the additional errors pointed out above are of sufficient weight and merit to call for a full review.

Petitioner's counsel, whose name is subscribed below, certifies that the present application is made in good faith and not for purposes of delay.

WHEREFORE, your petitioner prays that the Court reconsider the original petition, that the writ of certiorari heretofore granted be enlarged in scope so as to embrace the additional matters above set forth, either in whole or in part, and that petitioner be granted such other and further relief as may seem proper.

Dated: New York City, October 22, 1948.

ALVIN KRULEWITCH,
Petitioner.

By JACOB W. FRIEDMAN,
Counsel for Petitioner.